

The opinion in support of the decision being entered today
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SCOTT C. MILLER and KENNETH B. HIGGINS

Appeal 2006-3149
Application 09/864,478
Technology Center 1700

Decided: August 13, 2007

Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and
CHARLES F. WARREN, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 12, 14-16, 22, 23, 26, and 28-30. Claim 12 is illustrative:

12. A carpet tile, comprising a primary carpet and a cushion layer comprising a layer of polyurethane foam, wherein the primary carpet has a face weight less than or equal to about 15 oz/yd² and wherein the layer of polyurethane foam has a weight of about 2.72 - 8.24 oz/yd² and a density less than about 10 lbs./per cubic foot.

The Examiner relies upon the following references as evidence of obviousness:

Porter	EP 0,048,986	Jul. 4, 1982
Higgins ('857)	US 4,522,857	Jun. 11, 1985
Turner	EP 0,309,816	May 4, 1989
Higgins ('968)	US 5,540,968	Jul. 30, 1996

Appellants' claimed invention is directed to a carpet tile comprising a primary carpet and a cushion layer of polyurethane foam. The primary carpet has a face weight of less than or equal to about 15 oz/yd², and the polyurethane foam has a weight of about 2.72 - 8.24 oz/yd² and a density less than about 10 lbs./ft.³.

Appealed claims 12, 14-16, 22, 23, 26, and 28-30 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Higgins '857 and Higgins '968 in view of Porter and Turner.

Appellants set forth separate arguments for only claims 28 and 29. Accordingly, claims 12, 14-16, 22, 23, 26, and 30 stand or fall together.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we find ourselves in complete agreement with the Examiner's reasoned analysis and application of the prior art, as well as her cogent and thorough disposition of the arguments raised by Appellants. Accordingly, we will adopt the Examiner's reasoning as our own in sustaining the rejection of record, and we add the following for emphasis only.

There is no dispute that both Higgins patents, having the same assignee as Appellants, disclose a carpet tile comprising a primary carpet

and a cushion layer of polyurethane foam. The patents are silent with respect to the face weight of the primary carpet and disclose values for the weight and density of the polyurethane foam slightly outside the claimed ranges. However, as explained by the Examiner, Porter evidences that it was known in the art to have a polyurethane foam-backed primary carpet having a face weight of 14 oz/yd², which value is directly within the claimed range.

Also, we fully concur with the Examiner that there is no patentable distinction between Higgins' polyurethane foam weight of about 10 oz/yd² and Appellants' about 8.24 oz/yd². Likewise, we agree with the Examiner that there is no patentable distinction between Higgins' polyurethane foam density of about 12 lbs./per cubic foot and Appellants' about 10 lbs./per cubic foot. It is well settled that the term "about" allows for some variance, and Appellants' claimed values of about 8.24 and about 10 do not distinguish over the reference values of about 10 and about 12, respectively. *See In re DeVaney*, 185 F.2d 679, 683, 88 USPQ 97, 101 (CCPA 1950); *In re Ayers*, 154 F.2d 182, 185, 69 USPQ 109, 112 (CCPA 1946).

Moreover, to the extent there is any real distinction between the claimed and reference values for weight and density, we agree with the Examiner that the values are so close that one of ordinary skill in the art would have reasonably expected the polyurethane foams of Higgins having a weight of 10 oz/yd² and a density of 12 lbs./cubic foot to possess physical characteristics or properties that are essentially the same as those associated

with polyurethane foams within the scope of the appealed claims. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985).

Furthermore, it is by now axiomatic that where the difference between the claimed invention and that disclosed in the prior art is some range or other variable within the claims, the applicant must show that the particular range or variable is **critical**, generally by showing that the claimed range provides unexpected results relative to the range disclosed by the prior art. *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990). We note that while a Declaration of Mr. Michael Norton is of record, Appellants have not based any argument in their Brief on the Declaration. Accordingly, any such arguments are necessarily waived. However, we find it noteworthy that whereas the Declarant states that “[b]ased on my experience regarding performance requirements for tile, I was surprised to learn that a carpet tile had been made with a rebond foam cushion” (§20), the Declarant never states that any unexpected result is attached to such carpet tile.

Appellants contend that “the evidence of record indicates that in constructing a carpet tile, higher densities and mass per unit area levels have previously been considered necessary” (sentence bridging Br. 5-6). Appellants further submit that “[o]ne of skill in the tile art would have thought that too soft a cushion (too low a cushion density) would lead to issues or problems such as snow plowing, cushion failure, cushion crush,

edge ravel, increased roller friction, and the like” (Br. 6, second para.). Still further, Appellants maintain that:

One of skill in the cushion back carpet tile art would not reduce the face weight or the cushion weight or density below known acceptable levels and would especially not reduce both the face weight and the cushion weight or density and expect to produce a performing, durable, stable, tile product.

(Br. 7, first para.).

The flaw in Appellants’ argument is that they have not presented one shred of evidence which demonstrates that their carpet tile, having a face weight within the claimed range and a lower weight and density for the polyurethane foam, achieves an unexpected result, for example, a less expensive carpet tile that performs at least comparably to carpet tiles having a polyurethane foam with a higher weight and density. While Appellants maintain they have proceeded contrary to the prior art, we must agree with the Examiner that it is not enough to simply proceed accordingly, but to demonstrate that an unexpected result is achieved. Certainly, it is not invention to ignore the teachings of the prior art and suffer the disadvantages articulated in the prior art. *See In re Geisler*, 116 F.3d 1465, 1470, 43 USPQ2d 1362, 1365-66 (Fed. Cir. 1997).

Appellants’ separate arguments for claims 28 and 29 have been adequately addressed by the Examiner, and we will not further burden the record with redundant commentary.

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In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

clj

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